Office - Supreme Court,
FILED
DEC 2 9 195
JOHN T. FEY, Cl

Supreme Court of the United States

October Term 1956

No. 666

FRANK COSTELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD BENNETT WILLIAMS,
1000 Hill Building,
Washington 6, D. C.,

MORRIS SHILENSKY,
OSMOND K. FRAENKEL,
120 Broadway,
New York 5, N. Y.,
Attorneys for Petitioner.

INDEX

	PAGE
(a) The Opinions Below	1
(b) Statement of Grounds of Jurisdiction	2
(c) Question Presented for Review	2
(d) Statutes Involved	2
(e) Statement of the Case	3
(g) The Reasons Relied on for the Issuance of the Writ	4
Conclusion	11
APPENDIX:	
Opinion of United States District Court	13
Opinion of United States Court of Appeals for the Second Circuit	16
Order of Affirmance	17

Table of Cases Cited

Berra v. United States, 351 U. S. 131	4, 5, 6, 8, 10
Kepner v. United States, 195 U. S. 100	6
Mac Evoy v. United States, 322 U. S. 102	6
Olsen v. Delmore, — Wash. 2d —, 295 P. 2d 324	9
Robinson v. United States, 142 F. 2d 431	6
State v. Cory, 204 Or. 235, 282 P. 2d 1054	9
State v. Pirkey, 203 Or. 697, 281 P. 2d 698	9
United States v. Achilli, 234 F. 2d 797, cert. den. 352 U. S. 916	5

PAGE

United States v. Beacon Brass Co., 344 U. S. 43 .... 7, 10
United States v. Chase, 135 U. S. 255 6
United States v. Cincotta, not yet reported (N. D. N. Y. Crim. 31842) 5
United States v. Gilliland, 312 U. S. 86 7
United States v. H. J. K. Theatre Corp., 236 F. 2d 502 5
United States v. Lange, 128 F. Supp. 797 7
United States v. Moran, 236 F. 2d 361, cert. den. 352 U. S. 909 ..... 4, 5, 6
United States v. Nicastro, 143 F. Supp. 756 5
United States v. Stever, 222 U. S. 167 8

Washington v. Miller, 235 U. S. 422 6

Other Authorities Cited

Federal Rules of Criminal Procedure, Rule 35 4

Internal Revenue Act of 1864, 13 Stat. 223 5

18 U. S. C. 80 7
18 U. S. C. 1001 7
26 U. S. C. 145(b) 2, 3, 5, 6, 7, 8
26 U. S. C. 3616(a) 2, 3, 4, 5, 6, 7, 8
28 U. S. C. 1254(1) 2
28 U. S. C. 2255 ..... 4, 5

Supreme Court of the United States

October Term 1956

No.

—o—

FRANK COSTELLO,

Petitioner.

vs.

UNITED STATES OF AMERICA.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the final order of the United States Court of Appeals for the Second Circuit, which affirmed the dismissal by the United States District Court for the Southern District of New York of petitioner's motion for a correction of his sentence after conviction for filing false income tax returns with intent to evade taxes.

(a) The Opinions Below

The opinions of the District Court and of the Court of Appeals have not yet been reported. Copies thereof are hereto annexed as Appendix A (pp. 13-16, *infra*).

(b) Statement of Grounds of Jurisdiction

1. The order of the Court of Appeals was rendered on December 12, 1956 and is final.

2. No application was made for rehearing.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254(1).

(c) Question Presented for Review

1. May a person convicted of having wilfully attempted to evade income tax be sentenced under 26 U. S. C. 145(b) of the Revenue Code of 1939 rather than under 26 U. S. C. 3616(a) of that Code, where the indictment charged only the filing of a false and fraudulent return?

(d) Statutes Involved

Internal Revenue Code 1939

§ 145. Penalties—

* * *

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.

Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than

$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

§ 3616. Penalties.

Whenever any person—

(a) False returns.

Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made:

* * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(e) Statement of the Case

Petitioner was indicted on four counts, each of which charged that he "did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America * * * by filing and causing to be filed * * * a false and fraudulent income tax return * * *" (2a-4a).* The indictment made reference to 26 U. S. C. 145(b). The years covered were 1946 to 1949. The jury acquitted petitioner with regard to 1946; the Court of Appeals (221 F. 2d 668) set aside the conviction as to 1947. This Court (350 U. S. 359), limiting its review to the sufficiency of the evidence before the grand jury, affirmed the conviction.

Petitioner was sentenced to serve five years in prison on each count, the sentences to run concurrently, and was fined $10,000 on each count (7a, 20a). Thus, if the sentence was proper, petitioner must serve five years and pay $20,000.

---

* Parenthetic references unless otherwise indicated are to the Appendix in the court below.

Immediately after petitioner commenced serving his sentence (13a) he moved in the District Court under 28 U. S. C. 2255 and Rule 35 of the Federal Rules of Criminal Procedure for correction of his sentence on the ground that Section 3616(a) of the 1939 Code controlled the sentence for the offense with which he was charged and that it could not exceed imprisonment for one year and fine of $1,000 on each count (5a-13a).

The District Court denied the motion (22a) on the authority of *United States* v. *Moran*, 236 F. 2d 361. The Solicitor General opposed certiorari in that case on the ground that the question was not properly presented by the record and this Court denied certiorari on November 13, 1956, 352 U. S. 909. The Court of Appeals was then asked in the instant case to reconsider the question decided in *Moran*, but refused to do so (*infra*, p. 16).

(g) The Reasons Relied on for the Issuance of the Writ

The court below has decided an important question of federal criminal law which should be reviewed by this Court and has misconceived the purport of this Court's decision in *Berra* v. *United States*, 351 U. S. 131.

In *Berra* the question with regard to the sufficiency of the sentence was not raised and the issue, therefore, not resolved. The Court left it open for the issue to be raised—as it has been here—under 28 U. S. C. 2255. Justices Black and Douglas believed the issue should have been faced then and there (351 U. S. at 137).

The issue is important, having been raised in a large number of cases since the *Berra* decision.[1] In *Moran* the Solicitor General recognized that it should be set at rest by this Court, but believed that had not been the appropriate occasion, because the issue had not been raised in the District Court.[2] Here, of course, it has been so raised.

In *Berra* this Court, assuming that Section 3616(a) as well as Section 145(b) applied to income tax prosecutions,[3]

---

[1] After this Court's decision in *Berra* a motion was made under 28 U. S. C. 2255 but the issue was avoided by the District Court's exercise of discretion in reducing the sentence to the misdemeanor level (Order, June 25, 1956, East. Dist. Missouri, Eastern Division, Cr. 27866(2)). In addition to *Moran*, 236 F. 2d 361, the same issue was decided in *United States* v. *H. J. K. Theatre Corp.*, 236 F. 2d 502, application for certiorari pending under the name of *Ansell* v. *United States*, and *United States* v. *Achilli*, 234 F. 2d 797, cert. den. 352 U. S. 916, in all of which cases the issue was not originally presented by motion under Section 2255. In one case where such a motion was made the Court ruled that Section 3616(a) was not applicable to income taxes: *United States* v. *Nicastro*, 143 F. Supp. 756 (EDNY). See also *United States* v. *Cincotta*, not yet reported (NDNY, Crim. 31842).

[2] In the government's brief in opposition to certiorari in the *Moran* case the Solicitor General said:

> "These questions, arising from the overlap of the two Code provisions (see *Berra* v. *United States*, 351 U. S. 131), are being raised with increasing frequency in the lower courts. * * * Although it is desirable that the question be definitely resolved, the Court may consider that review by it should await the arrival of a petition and record properly presenting the issue."

[3] The legislative history of Section 3616(a) buttresses the fact that it applies to income tax returns. Section 3616(a) was first enacted as part of an Internal Revenue Act which contained an income tax. This was Chapter 173 of the 38th Congress, 1st Session, enacted 1864, 13 Stat. 223. Section 11 (13 Stat. 225) made it a duty on various persons "to make a list or return * * * of the amount of annual income * * *." Section 15 (*id.* 227—sometimes erroneously cited as 226) contains substantially the same language as 3616(a). Section 116 (*id.* 281) contains the provision relating to income tax. Section 118 (*id.* 282) provides that if an individual fails to file a return the assessor can assess. It imposes no other penalty. Sections 120-122 (*id.* 283, 285) impose specific taxes on certain corporations and provide a penalty of a fine for a failure to make a return but no penalty for a false return.

held (351 U. S. at 134) that the two sections "covered precisely the same ground" in that instance. And the relevant facts here are identical. The Court of Appeals in *Moran* limited this statement as applicable only to the issue of intent (236 F. 2d at 363, note 4). This, we submit, is not justified by anything said by this Court in *Berra*.

Petitioner makes two basic contentions: 1) that Section 3616(a) controls over Section 145(b) wherever, as here, the only charge in the indictment is the filing of a false return, on the familiar principle that in this respect Section 3616(a) is a specific statute, dealing only with the filing of false returns, whereas Section 145(b) is a general provision dealing with evasion of income taxes by any means; 2) even if it be held that either section might be applicable, then the section imposing lesser penalties must control as otherwise improper discretion would be vested in prosecutors which would conflict with the Constitution as an unlawful delegation or as denial of due process.

The Court of Appeals in *Moran* dealt only with the first of these issues although the second had been presented to it. While this omission was specifically called to that court's attention in the case at bar, it nevertheless adhered to its original reasons in *Moran*.

1. In *Moran* the court below apparently accepted the contention of both parties that a specific statute controls over a general one.[4] But it did not decide which of the two sections was the specific one. Instead it rested its entire decision on the statement that "each section requires an element of proof not required by the other" and considered the case "directly controlled" by *United States* v.

---

[4] Citing *MacEvoy* v. *United States*, 322 U. S. 102, 107, 74 S. Ct. 890, 88 L. Ed. 1163; *Washington* v. *Miller*, 235 U. S. 422, 428, 35 S. Ct. 119, 59 L. Ed. 295; *Kepner* v. *United States*, 195 U. S. 100, 125, 24 S. Ct. 797, 49 L. Ed. 114; *United States* v. *Chase*, 135 U. S. 255, 260, 10 S. Ct. 756, 34 L. Ed. 117; *Robinson* v. *United States*, 8 Cir., 142 F. 2d 431.

Beacon Brass Co., 344 U. S. 43, citing also *United States* v. *Gilliland*, 312 U. S. 86, and *United States* v. *Lange*, 128 F. Supp. 797. In the case at bar the court below has not added anything to its earlier consideration of the problem.

We submit that the question which of the two sections is the specific one and therefore controlling should be decided by this Court. It cannot be avoided by reliance on the cases cited by the court below. In each of those cases the indictment required proof other than was required under the alternative provision of law which the defense in those cases argued was applicable. In the case at bar the proof required by the indictment was identical under both sections.

Thus, in the *Beacon Brass* case a false statement which could have supported a conviction under 18 U. S. C. 80 would not by itself support a conviction under the section on which the prosecution rested, namely, 26 U. S. C. 145(b), because the latter section, but not the former, required proof of a wilful intent to evade taxes. In the *Gilliland* case the indictment (see 35 F. Supp. 181 at 183) had not charged a violation of the Hot Oil regulations, but merely the making of a false statement in a matter of federal concern. This was sufficient under 18 U. S. C. 80, but would not have been sufficient under the so-called Hot Oil statute. In the *Lange* case the indictment under 18 U. S. C. 1001 did not charge that the false statement was made under oath, whereas under the perjury statute it would have been necessary not only to charge that, but also to charge that the oath was validly administered.

In the case at bar the indictment charged the filing of a false return for the purpose of evading taxes. This charge comes precisely within both statutes. While it was essential to allege that this was in connection with income taxes to bring the case within Section 145(b), no prosecution could have been had under Section 3616(a) without

alleging, in identical language, that the return was filed for the purpose of evading taxes, and certainly it would have been necessary to state what tax was involved. We have, therefore, complete identity of allegations.

Coming then to the basic problem, Section 3616(a) covers the specific method of tax evasion here charged, namely, the filing of a false and fraudulent income tax return; Section 145(b) covers all methods. True, Section 145(b) deals with a more limited category of taxes, but that, we submit, is not an appropriate criterion. There are various other sections which deal with particular kinds of taxes which also use the same words as does Section 145(b), those dealing with Estate and Gift Taxes and Admissions and Dues (Int. Rev. Code of 1939, §§ 894, 1024, 1718). If each of these is to be deemed the "specific" section applicable regardless of the method of evasion, then Section 3616(a) will have no important use. Moreover, as the government stated in its brief in this Court in *Berra*, Section 3616(a) has been and is still being used for income tax evasions. Since it is the only provision dealing with the specific method of evasion which was the only method relied on in the indictment here, it should be held to be the specific statute dealing with that method and so controlling over any others.

2. On the other phase of the case, namely, the impropriety and unconstitutionality of permitting a prosecutor at his unlimited discretion to decide which person is to be prosecuted for a misdemeanor and which for a felony, we believe what Mr. Justice Lurton said many years ago in *United States* v. *Stever*, 222 U. S. 167, at 173-174, to be applicable here:

> "If, then, this indictment is also maintainable under § 3894, it must be because we are forced to conclude that Congress, when it revised the statutes, intended to make the use of the mails to effect a

> scheme to defraud indictable and punishable under either of two distinct provisions, and that the district attorney might elect as to which he would proceed under. Such a supposition is not to be lightly adopted. To so conclude would result in the anomaly of an offense created and punished by two distinct enactments. Under the one the accused may be proceeded against in a district where he could not be prosecuted under the other. The procedure under one differs in some important particulars from that admissible under the other, and the accused is subject to a measure of punishment under one not possible under the other."

More recently the subject has received attention by the Supreme Courts of Oregon and Washington. Both have held unconstitutional laws which expressly attempted to give a prosecutor such discretion. *State* v. *Pirkey*, 203 Or. 697, 281 P. 2d 698; *State* v. *Cory*, 204 Or. 235, 282 P. 2d 1054; *Olsen* v. *Delmore*, — Wash. 2d —, 295 P. 2d 324. Clearly no federal prosecutor should be given that great power where Congress has not expressly indicated that it wanted him to have it and the result has, so to speak, come about through inadvertence.

In the first of these state cases the court said (203 Or. at 706-707, 281 P. 2d at 702-703):

> "* * * It would be monstrous to uphold and enforce a statute which authorized a grand jury or magistrate to determine finally whether an accused should receive a fine or a jail sentence, on the one hand, or a penitentiary sentence, on the other, and to make that decision before trial, without having heard any evidence for the defendant, either on the issue of guilt or of mitigation, and on the sole basis of a prima facie case made against one still presumed to be innocent. * * * We see in this statute no pro-

vision whereby one charged with a misdemeanor could be sentenced as for a felony, however heinous the offense might after trial appear to have been. Again, if the defendant is proceeded against as for and convicted of a felony, there is no provision authorizing the court in its informed discretion to impose punishment as for a misdemeanor, however strong the evidence in mitigation might be. In our opinion, such a statute so construed would not only violate the Equal Protection Clause and constitute an unauthorized delegation of discretionary power, but it would constitute an invalid encroachment upon the function of the courts whose prerogative and duty it is to determine, not only guilt, but punishment, upon judicial inquiry, after public trial and within the maximum and minimum limits prescribed by the legislature."

Directly in point is what Mr. Justice Black said (with the concurrence of Mr. Justice Douglas) in *Berra* (351 U. S. at 138, 140):

"* * * I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual—a result which seems to me to be wholly incompatible with our system of justice. Since Congress has specifically made the conduct charged in the indictment a misdemeanor, I would not permit prosecution for a felony under the broad language of § 145(b). Criminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly.

"So far as I know, this Court has never approved the argument the Government makes here. It certainly did not do so in *United States* v. *Beacon Brass Co.*, 344 U. S. 43, upon which the Government seems to rely. * * *

* * *

"The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same. It is true that there may be differences due to different appraisals given the circumstances of different cases by different judges and juries. But in these cases the discretion in regard to conviction and punishment for crime is exercised by the judge and jury in their constitutional capacities in the administration of justice."

CONCLUSION

We submit, therefore, that the writ should issue.

Respectfully submitted,

EDWARD BENNETT WILLIAMS,
1000 Hill Building,
Washington 6, D. C.,

MORRIS SHILENSKY,
OSMOND K. FRAENKEL,
120 Broadway,
New York 5, N. Y.,

Attorneys for Petitioner.

APPENDIX

(Opinion of United States District Court)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

—o—

UNITED STATES

against

FRANK COSTELLO

—o—

McGOHEY, *D. J.*

The defendant has timely moved pursuant to Section 2255 of Title 28 U. S. C. A. and Rule 35 of the Federal Rules of Criminal Procedure for an order "vacating, setting aside and correcting that part of the sentence which imposed five years imprisonment and a fine totalling $20,000."

The defendant was tried on an indictment containing four counts which respectively charged that in each of the years 1946 through 1949 he wilfully attempted to evade payment of income taxes due the United States by "filing a false and fraudulent income tax return" in violation of Sec. 145(b) of the Internal Revenue Code of 1939. The jury, on May 13, 1954, returned verdicts of not guilty on the first count, and guilty on the second, third and fourth counts. The defendant was sentenced on each of the latter counts to a term of five years and a fine of $10,000, plus costs of prosecution, the prison terms to run concurrently. The Court of Appeals reversed as to the second count and

affirmed as to the third and fourth counts.[1] The Supreme Court, reviewing only the legal sufficiency of the evidence before the Grand Jury, affirmed.[2]

This motion presents the question, not heretofore raised by the defendant, whether, in view of Sec. 3616(a) of the Internal Revenue Code of 1939, the Court could legally impose five-year terms and $10,000 fines.

Section 145(b) provides:

> "Any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 3616(a) provides that any person who

> "Delivers or discloses to the collector or deputy any false or fraudulent * * * return, * * * with intent to defeat or evade the * * * assessment intended to be made * * * shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

The defendant does not contend that the latter section repealed the former. His contention is that since both sections cover precisely the same ground, "the specific offense of filing a false return with intent to evade taxes, under Sec. 3616(a) prevails over the general denunciation

---

[1] 221 F. 2d 668.

[2] 350 U. S. 359.

of attempting to evade taxes denounced by Sec. 145(b)" and therefore a sentence greater than one year and $1,000 fine on each count is illegal.

The motion is denied on the authority of United States v. Moran [3] in which the Court of Appeals for this Circuit rejected a similar contention.

Settle order.

Dated: New York, N. Y.,
August 21, 1956.

JOHN F. X. MCGOHEY,
U. S. D. J.

---

[3] 2 C. — F. 2d —; decided Aug. 15, 1956.

(Opinion of United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

Before:

SWAN, MEDINA and WATERMAN,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, John F. X. McGohey, *Judge.*

HAYS, ST. JOHN, ABRAMSON, HEILBRON, DELANEY & DONOGHUE, *Attorneys for Appellant;* Osmond K. Fraenkel, Morris Shilensky, Joseph Leary Delaney and Jacob Kossman, of Counsel.

PAUL W. WILLIAMS, United States Attorney, *for Appellee;* Arthur H. Christy, Robert Kirtland and William K. Zinke, Assistant United States Attorneys, of Counsel.

PER CURIAM:

Appeal from denial of a motion to correct a sentence imposed under 26 U. S. C. A. § 145(b). On the authority of *United States* v. *Moran*, 2 Cir., 236 F. 2d 361, certiorari denied November 13, 1956, the order is affirmed.

(Order of Affirmance)

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of December, 1956.

Present:

HON. THOMAS W. SWAN,
" HAROLD R. MEDINA,
" STERRY R. WATERMAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

against

FRANK COSTELLO,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

AND WHEREOF, IT IS NOW HEREBY ORDERED, ADJUDGED AND DECREED that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.